United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

74-1431

B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

P/S

UNITED STATES OF AMERICA, ex rel.
ULYSSES BIRT,

Relator-Appellant,

-against-

HON. THEODORE SCHUBIN, Superintendent,
Ossining Correctional Facility,
Ossining, New York,

Respondent-Appellee.

BRIEF FOR RESPONDENT-APPELLEE

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent-
Appellee
Office & P.O. Address
Two World Trade Center
New York, New York 10047

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

DAVID R. SPIEGEL
Assistant Attorney General
of Counsel

3 Copies Rec'd
6/20/74
Roy Mead—
Atty for Relator-Appellant

TABLE OF CONTENTS

	PAGE
Table of Authorities	i, ii
Statutes	iii
Question Presented	1
Statement	2
Facts	2
A. The Identification Hearing	3
B. The Trial	6
Prior Proceedings	12
Argument - NICHOLS IN-COURT IDENTIFICATION OF PETITIONER WAS CLEARLY PERMISSIBLE	12
Conclusion	20

TABLE OF AUTHORITIES

	Page
LaVallee v. DelleRose, 410 U.S. 690 (1973) (per curiam)	14
Neil v. Biggers, 409 U.S. 188, 198-199 (1972).....	15,20
Simmons v. United States, 390 U.S. 377, 384 (1968).....	12
United States ex rel. Armstrong v. Casscles, 489 F. 2d 20, 23-24 (2d Cir. 1973).....	13,15,16, 17,20
United States ex rel. Bisordi v. LaVallee, 461 F. 2d 1021, 1023 (2d Cir. 1971).....	13
United States ex rel. Cannon v. Montanye, 486 F. 2d 263 (2d Cir. 1973).....	17
United States ex rel. Cummings v. Zelker, 455 F. 2d 714 (2d Cir. 1972).....	17
United States ex rel. Frasier v. Henderson, 404 F. 2d 260, 265 (2d Cir. 1972).....	13
United States ex rel. Gonzalez v. Zelker, 477 F. 2d 797, 800, 803-804 (2d Cir. 1973).....	13,15,18, 20
United States ex rel. Haynes v. LaVallee, 74 Civ. 52, U.S.D.C., E.D.N.Y. (unpublished memorandum opinion of Judge Travia, dated February 25, 1974), cert. prob. cause denied ____ F. 2d ____ (2d Cir. May 10, 1974).....	13,20
United States ex rel. Phipps v. Follette, 428 F. 2d 912, 915 (2d Cir. 1970), cert. denied 400 U.S. 908 (1970).....	16

PAGE

United States ex rel. Robinson v. Zelker, 468 F. 2d 159 (2d Cir. 1972) cert. denied, 411 U.S. 939 (1973)..... 17

United States ex rel. Smiley v. LaVallee, 473 F. 2d 682 (2d Cir. 1973) cert. denied, 412 U.S. 952 (1973)..... 19

United States ex rel. Valentine v. Zelker, 446 F. 2d 857 (2d Cir. 1971)..... 17

United States v. Evans, 484 F. 2d 1178, 1184 (2d Cir. 1973)..... 13

United States v. Mims, 481 F. 2d 636 (2d Cir. 1973)..... 17

STATUTES

PAGE

28 U.S.C. § 2254(d)..... 14

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 74-1431

UNITED STATES OF AMERICA, ex rel.
ULYSSES BIRT,

Relator-Appellant,

-against-

HON. THEODORE SCHUBIN, Superintendent,
Ossining Correctional Facility,
Ossining, New York,

Respondent-Appellee.

BRIEF FOR RESPONDENT-APPELLEE

Question Presented

Whether the showing of a limited photographic display to the identifying witness on the day of the crime irreparably tainted a subsequent in-court identification?

Statement

In this habeas corpus proceeding, petitioner-appellant, Ulysses Birt, contends that a pre-trial showing of his photographs to a witness impermissibly tainted that witness' subsequent in-court identification of him.

Appellant's claims were denied in a memorandum opinion of the United States District Court for the Southern District of New York (Ward, J.), dated February 26, 1974. A certificate of probable cause was granted by Judge Ward in an order dated March 28, 1974.

Facts

Petitioner was tried by a jury in the Supreme Court, Kings County (Corso, J.) from March 22-25, 1971 and was found guilty of the crimes of robbery in the first degree, grand larceny in the first degree and possession of a weapon as a felony. Petitioner was thereafter sentenced to a term of imprisonment not to exceed five years. However, as of June 26, 1973, petitioner was paroled from Ossining Correctional Facility.

The facts and circumstances that are pertinent to petitioner's present claims are contained in the minutes of his pre-trial Wade-Gilbert hearing in Kings County Supreme Court on January 28, 1971, and his subsequent trial in the same court. (The Wade-Gilbert hearing is referred to by the letter "W" followed by the appropriate page number; the trial is referred to by the letter "T", followed by the appropriate page number). The relevant testimony of witnesses at these proceedings is herewith summarized.

A. The Identification Hearing

JOSEPH NICHOLS, aged sixteen, then residing in an addict rehabilitation center, was the principal witness at the hearing (W5-50). On January 3, 1969, Nichols was 14 years old and had not been using heroin for a year (W8). On that date, at approximately 1:15 to 1:30 he was in Brooklyn, at Union Street, near the intersection of Third Avenue and Nevins Street (W9). At this time, he saw a blue car racing up Third Avenue (W10). The car stopped about 15 feet away from him and a man got out (W11). The man was about five or six feet away when he got out of the car (W12). The man was a negro, wearing

a brown jacket (W12-13). The man ran past Nichols, crossed the street, threw something underneath a car, ran up Union Street, stopped a truck, and got a ride up the block (W14). The witness then identified the petitioner as the man he had seen that day (W14).

Nichols saw the car the man had exited from searched by the police a few minutes later and saw the officers remove "keys and stuff" and "some money" (W33-34). He also saw a "mask, like a skiing mask" (W37).

The next day, in response to a telephone call from a Detective Robles, Nichols came down to the police station and picked out petitioner twice from a mixed lineup (W16-21).

On cross-examination, Nichols admitted to playing hookey from school during the entire month of January, 1969 (W23). Although he had not used drugs for a year before the time of the incident, he had used heroin before and had begun using it again thereafter (W43).

At the conclusion of the hearing, after also hearing corroborating testimony from Detective Neilson Robles (W50-

74), the police officer who had summoned Nichols to the stationhouse to identify Birt, and testimony from Birt himself (W74-78), the court (Corso, J.) made the following findings of fact:

> "That on January 3, 1969, Joseph Nichols, then approximately fourteen years of age, was at or near the corner of Union Street and Third Avenue; that he saw a blue car and because of a screeching of brakes or a screaming noise, he was caused to jump out of the way, jump on to the sidewalk; that he turned and saw a blue car making a turn into Third Avenue, stop, saw a man jump out; that at the time he was approximately fifteen feet away. The man who jumped out then ran; that he observed him throw an object under the car; that Joseph Nichols saw the face of that man; that he was a negro and that at the time wearing a brown jacket; that he observed the man jump behind the car; that he then saw a police car pass. When the police car went by, he saw the same man come from behind the car, run up the block, stop the truck, get into it and was driven away. Joseph Nichols identified the defendant here in the court-room as being the person he observed jumping out of this blue car, jump behind the parked car and then running up the block and getting into a passing truck."

The court then went on to note:

"... the in-court identification made by Joseph Nichols, first, was based upon his own independent recollection of his viewing of the defendant at the scene on January 3, 1969 and by scene, the Court means Union Street around or about Third Avenue. The Court finds that as far as the in-court identification, that even if Nichols had not viewed the defendant at the 76th Precinct, his recollection of the defendant would have made him able to identify the defendant in court today." (W85).

B. The Trial

CONSTANTINO COPPOLA testified that he went to a bank on January 3, 1969, to pick up his company payroll and at about 1:15 p.m. on that date, he was returning with approximately $5,000 (T37). A 1964 blue Chevrolet pulled alongside Coppola's car. The driver, a negro wearing a ski mask, got out and demanded the payroll (T38-39). The man was wearing a brown jacket with sheep wool around the collar (T37). When Coppola denied that he had a payroll, the man put a pistol to his side (T40). The masked man said he had followed Coppola from the bank and had seen him get the payroll. Coppola surrendered the money (T41). The man demanded Coppola's car keys and said he would throw them under the car (T41).

Coppola got out of his car after the man left. A police car was flagged down and they followed the perpetrator's automobile (T43). They lost sight of the car for a short time, but found it again on Third Avenue and Nevins Street. The motor was running (T44). The payroll was on the floorboard (T44). The ski-mask and a pair of gloves were on the seat (T45).

JOSEPH NICHOLS testified as to his drug involvement, but stated that he was not presently using drugs and had not used drugs either one year prior to or one year subsequent to the incident in question (T48-51). At about 1:20 p.m. on January 3, 1969, he was on Third Avenue and Nevins Street in Brooklyn at which time he saw a blue car come down the block (T51). A man jumped out, looked around, ran across the street and threw an object underneath a car (T52). Nichols saw the man's face initially at a distance of about five feet (T52). He said the man was wearing a brown jacket. Nichols did not remember if the jacket was summer or winter weight or if it had a wool collar (T62-67). He identified the petitioner as the man he had seen on January 3, 1969.

Police officers arrived on the scene. One of the officers took a gun from underneath the car (T55). He also saw the officer take a brown envelope, and a ski mask out of the car from which the man jumped (T56).

PATROLMAN WILLIAM COOPER testified that on January 3, 1969, he was on duty at the 76th Precinct (T106). At about 1:15 p.m., on Carroll Street, between Bond and Nevins, he was approached by a Mr. Coppola and as a result of information received, he chased an automobile (T107), a 1964 blue-green Chevrolet (T107-108). The car was found parked on Third Avenue (T109); the motor was running (T110). Inside the car was a package, a hat, gloves, and a ski-mask (T110). After having a conversation with Joseph Nichols, Cooper went across the street and found a .32 caliber revolver under a parked car (T111).

PATROLMAN EDWARD P. McCARTHY testified to substantially the same facts as his partner, Patrolman Cooper (T117-128).

DETECTIVE NEILSON ROBLES testified that he arrived at Third Avenue and Union Street, Brooklyn on January 3, 1969, at approximately 1:30 or 1:40 p.m. He saw a 1964 Chevrolet there and he was given a gun by either Cooper or McCarthy (T129). He was also given a ski-mask and a set of keys (T130). Robles found a pair of gloves in the car (T131), and he also found an envelope addressed to Joanne Birt, 642 Park Place, under the front seat (T132). The registration certificate for the car was found in the glove compartment. The car was registered to an Eleanor Walton (T132).

On January 3rd, Robles went to 642 Park Place and spoke to a woman who answered to the name Eleanor Walton (T135).* Robles entered the apartment and took two photographs from the top of a desk (T138). The officer took various papers the following day (140-143). The petitioner was arrested on January 4th (T146) in the apartment of Eleanor Walton (T147). He was advised of his Miranda rights (T147-148) after which he stated that the ski mask found in the blue Chevrolet was his son's (T148). He stated the gloves belonged to him (T149). Joanne Birt is his daughter (T150). The keys found in the car were his own which he used for his wife's car (T150). The sunglasses belonged to him (T153). The petitioner further stated that "Eleanor Walton" is one of the names his wife used (T154). He denied owning the revolver (T155) and also participating in the hold-up (T156). Birt said he was at the Holiday Inn at Kennedy Airport at the time of the robbery (T157).

*At petitioner's Huntley Hearing, held on March 22, 1971, the People, on cross-examination of Mrs. Catherine Birt, petitioner's wife, set forth the theory that Eleanor Walton was an alias used by Mrs. Birt to hide from the Welfare Department the fact that she and her husband (sic, the petitioner) owned a car and various other property (Huntley Hearing Minutes, 69; the Huntley Hearing Minutes are part of the record on appeal and are hereafter referred to by the designation "HH"). Mrs. Birt contended that Eleanor Walton was the wife of a friend of her husband's and that she did not know her (HH67-68). However, the two had the same address (HH58), and Mrs. Birt conceded that she received Eleanor Walton's mail in her mailbox (HH72). In addition, although Mrs. Birt contended that the blue car used in the robbery belonged to Mrs. Walton, she admitted that she had been using it for the two and a half to three months prior to the robbery (HH68).
Mrs. Birt did not testify at the trial.

A form signed by Robles states that the revolver was found on the seat of the car (T175).

At the conclusion of the People's case, the petitioner moved to dismiss for failure to establish a prima facie case (T189). Counsel argued that as Nichols had testified at trial that he had been shown photographs prior to the line-up, the in-court identification was tainted (T190). Counsel sought to have the identification stricken and if stricken, he argued, there was no prima facie case (T191). The Assistant District Attorney in opposing colloquy indicated that he had questioned Detectives Robles about showing Nichols the photographs and that the officer had told him that the witness was simply mistaken; that he may have shown the photographs after the line-up, but not before (T196).

The Wade Hearing was reopened by the Court. Petitioner stated that he would not participate (T197) and he objected to the procedure (T206).

JOSEPH NICHOLS was recalled and testified that he was not shown any photographs prior to the line-up (T212). He saw the photographs the day of the incident (the day preceding the line-up)(T212). When looking at the line-up, Nichols was looking for the man he had seen getting out of the car (T217-218).

DETECTIVE ROBLES denied showing any photographs to Nichols (T217-218).

The Court then made a factual finding that accepted Nichols' testimony as to the pictures (T221). Having done so ruled it that:

> "there was no suggestive influences practiced upon Joseph Nichols nor was any suggestion directly or indirectly made that the photographs that were being shown to him represented either the defendant or a suspect to the crime" (T221).

The Court thus adhered to its conclusion at the original Wade Hearing that the People had established by clear and convincing evidence that the in-court identification was not tainted and was therefore admissible (T222).

Subsequently, at the conclusion of the People's case, the defense called no witnesses. Instead, adopting a tactic which is identical to the one now used herein, defendant, through his counsel, maintained vigorously that Nichols' identification simply was not credible, having been manufactured by police duplicity (e.g. T243-247).

On March 25, 1974, the jury returned a verdict finding Birt guilty of all counts of the indictment.

Prior Proceedings

Petitioner's present claim was exhausted in the state courts on direct appeal from his conviction. On June 19, 1972, the Appellate Division, Second Department unanimously affirmed the judgment of conviction; on September 8, 1972, the Court of Appeals (Fuld, C.J.) denied leave to appeal.

The present proceeding was instituted in the United States District Court for the Southern District of New York, by petition dated October 31, 1972. Thereafter, in a memorandum opinion dated February 26, 1974, the District Court (Ward, J.) denied petitioner's application, indicating that the state court record controverted Birt's claims (Pet's. Appendix, A-7).

Argument

NICHOLS IN-COURT IDENTIFICATION OF PETITIONER WAS CLEARLY PERMISSIBLE.

A.

In recent decisions dealing with the issue of whether an allegedly improper photographic showing to an identifying witness has caused an irreparable taint to that witness' subsequent in-court identification of an accused, this court, interpreting Simmons v. United States, 390 U S 377, 384 (1968), has held that:

> "... the required inquiry is two-pronged: first, whether the identification procedure was impermissibly suggestive; and, second, if so, whether under the totality of the circumstances, it has such a tendency to give rise to a substantial likelihood of irreparable misidentification that to allow the witness to make an in-court identification would violate due process." (U.S. ex rel. Armstrong v. Casscles, 489 F. 2d 20, 23-24 [2d Cir. 1973]).

See also, U.S. ex rel. Gonzalez v. Zelker, 477 F. 2d 797, 800 (2d Cir. 1973); U.S. ex rel. Frasier v. Henderson, 464 F. 2d 260, 265 (2d Cir. 1972); U.S. ex rel. Bisordi v. LaVallee, 461 F. 2d 1021, 1023 (2d Cir. 1972). Absent a showing "both of impermissibly suggestive procedures, and of the substantial likelihood of misidentification ... this court [has] concluded that eyewitness identification was to be admitted", U.S. v. Evans, 484 F. 2d 1178 (2d Cir. 1973), at 1184; See also U.S. ex rel. Haynes v. LaVallee, 74 Civ. 52, U.S.D.C., E.D.N.Y. (unpublished memorandum opinion of Judge Travia, dated February 25, 1974), cert. prob. cause denied, ____ F. 2d ____ (2d Cir. May 10, 1974).

An examination of the relevant circumstances in the present case clearly indicates that petitioner's claim has failed to satisfy the two-pronged analysis of the cases cited supra.

B.

The basis for petitioner's claim is the fact that on the day of the crime (the day before the police station line-up) the identifying witness, Nichols, was shown two photographs of the accused. Petitioner asserts that the per se fact that such a showing was made irreparably taints the subsequent police station and in-court identifications made by Nichols. However, the contention is clearly meritless.

In the first place, with regard to the photographic showing, it should be noted that after hearing testimony by Nichols and by the police officer who showed him the photographs, the trial court judge made the following obviously pertinent finding:

> "There was no suggestive influence practiced upon Joseph Nichols nor was any suggestion directly or indirectly made that the photographs that were being shown to him represented either the defendant or a suspect to the crime."
> (T221, Emphasis added)

It is well established law that this finding is entitled to a strong presumption of correctness. See 28 U.S.C. § 2254(d), as discussed in LaVallee v. DelleRose, 410 U.S. 690 (1973) (per

curiam)*. Indeed, the finding has already been accepted as true by the lower federal court herein (See Petitioner's Appendix, A3-7).

In any event, even assuming that the mere fact that there was a two photograph showing is improper, the crucial and obviously controlling reality is that the totality of the circumstances involved herein unmistakenly establish that Nichols' in-court identification was based on an independent recall of the events of petitioner's escape. See Neil v. Biggers, 409 U.S. 188 (1972) at 198-199; also Armstrong and Gonzalez cases, both cited supra, p. 13.

*Petitioner argues that the state court finding that no suggestive influence was practiced upon Nichols is a question of mixed law and fact, which falls outside the scope of § 2254(d), and that he is therefore entitled to an independent federal evidentiary hearing (Applt's. Br. pp. 13-15). However, while this court has held that the overall question of whether a limited photographic array taints a subsequent in-court identification is a question of mixed law and fact [e.g. Armstrong, 489 F. 2d at 23, cited supra], it has certainly never reached this conclusion in regard to a state court finding such as the present one, which is based solely on witness testimony and credibility. Cf. Gonzalez, 977 U.S. at 800, cited supra. It should also be noted that where it suits petitioner's purpose -- that is, in regard to the state court's finding after the reopened Wade hearing that Nichols was shown two photographs of himself on the day of the robbery -- he accepts the state court's findings without hesitation (Applt's. Br., p. 6, ff).

Nichols' uncontroverted testimony prior to and at the trial indicated that he was standing on a street corner in Brooklyn when a blue car came racing up the street and jammed to a halt. He then saw a man jump out, run past him, throw something under a car, which subsequently turned out to be a gun, and then jump on the back of a passing truck (W9-13). Obviously such a startling series of occurrences would create a strong motivation in Nichols "to make a careful observation of the perpetrator". U.S. ex rel. Phipps v. Follette, 426 F. 2d 912, 915 (2d Cir. 1970), cert. den. 400 U.S. 908 (1970); Armstrong, 489 F. 2d 20, cited supra, p. 13. Indeed, when police arrived on the scene, Nichols immediately told them about what he had seen (T55, 111).

Furthermore, it is clear that Nichols had a more than ample opportunity to observe Birt. When the blue getaway car stopped, it was a mere 10-15 feet from Nichols (W9-11), and when petitioner jumped out of the car, he was only about five or six feet away (W12). Since the robbery took place in the early afternoon (T37), the lighting conditions were obviously good. Moreover, Nichols indicated that the entire sequence of events, from the time Birt jumped out of the car until he hitched a ride on the back of the truck, took a "couple of minutes"

(T78-80), rather than a fleeting time span, as petitioner suggests (Applt's. Br. p. 10). In a line of cases this court has upheld identifications that were made under far more rushed circumstances than the one at issue here. Armstrong, 489 F. 2d 20, cited supra (brief observation by bystander who was standing outside store while it was being robbed); U.S. v. Mims, 481 F. 2d 636 (2d Cir. 1973)(1 minute observation); U.S. ex rel. Cummings v. Zelker, 455 F. 2d 714 (2d Cir. 1972)(15 second observation); U.S. ex rel. Valentine v. Zelker, 446 F. 2d 857 (2d Cir. 1971)(30 second observation); cf. United States ex rel. Robinson v. Zelker, 468 F. 2d 159 (2d Cir. 1972), cert. denied 411 U.S. 939 (1973), where this court ordered an evidentiary hearing in a situation in which the distance of the observation was approximately fifty feet and the time of the observation was estimated at 2 to 17 seconds; also, United States ex rel. Cannon v. Montanye, 486 F. 2d 263 (2d Cir. 1973), where the identifying witness' observations were limited by the fact "she was assaulted at night on the street, grabbed from behind, and raped with her skirt held over her head" (id. at 267).*

*The Cannon and Robinson cases are cited in petitioner's brief at pp. 9 and 10, respectively.

Finally, following the method of analysis used by this court in the Gonzalez case, 477 F. 2d at 803-804, cited supra, it is appropriate to consider the "accumulated circumstantial evidence" which was placed before the jury at Birt's trial and which "tend[ed] to establish that there was not substantial likelihood of misidentification". This evidence included the identical testimony of the victim of the robbery (Coppola) and Nichols as to the color of the getaway car (blue); the convergent testimony on the color of Birt's outergarment (brown); and, most significantly, it included Birt's admission to the arresting officer that the ski mask found in the car -- the one used in the holdup and the one seen by Nichols shortly thereafter -- as well as the keys, eyeglasses, and various other items found therein, all belonged to himself or members of his family. In addition, Birt was arrested in the same apartment to which the items in the car were eventually traced.*

*The pertinent testimony in this regard was made by Detective Neilson Robles during petitioner's Huntley Hearing, and was uncontroverted by Catherine Birt, petitioner's wife (See HH, Robles: 8-27; Catherine Birt, 58-70). Petitioner did not testify at the Huntley Hearing. His only testimony, given at the Wade Hearing, did not deal with this point.

Petitioner's attempt to belittle Nichols' independent recall by suggesting that as a long time drug user he was susceptible to police suggestion (Applt's. Br. p. 12) is, at best, irrelevant. Nichols' testimony explicitly indicates that he was not using drugs for a year prior to and a year after the incident at issue here (T50-51); moreover, Nichols' description of the specific events involved in petitioner's abandonment of his blue getaway car were virtually identical at the initial Wade Hearing and at the trial (W11-15, T51-53), thus indicating his recollection of what happened was plainly his own (See also pp. 3-4, 7 supra).

With regard to Nichols' description of him, petitioner seems to suggest, by his juxtaposition of case authority, that the appropriate standard for detail must be the same here as in the case of an intelligent, young social worker. [See Applt's. Br. p. 12 citing United States ex rel. Smiley v. LaVallee, 473 F. 2d 682 (2d Cir. 1973), cert. denied, 412 U.S. 952 (1973)]. However, to the contrary, we think it is clear that the detail of Nichols' account -- including his convergent recall with the robbery victim as to the color of petitioner's

outer garment -- is more than ample to qualify it within the ambit of the standard set down by the Supreme Court in the Biggers case, 409 U.S. at 199 (cited supra), and adhered to in the various decisions of this circuit already noted herein. See, e.g. Armstrong, Gonzalez and Haynes cases, all noted supra, p. 13. Indeed, petitioner's recent misidentification claim has not only been rejected by the state appellate courts and by the lower court herein, but it has also been vigorously presented to and rejected by the jury which tried his case (See, supra, p. 11).

CONCLUSION

THE DECISION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DENYING APPELLANT'S APPLICATION FOR A WRIT OF HABEAS CORPUS SHOULD IN ALL RESPECTS BE AFFIRMED.

Dated: New York, New York
June 18, 1974

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent-
Appellee, Schubin

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General
DAVID R. SPIEGEL
Assistant Attorney General
of Counsel